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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW CHARLES CALLANMARSH,

Defendant and Appellant.

C080465

(Super. Ct. No. SF128498B)

Defendant Matthew Charles Callanmarsh pleaded guilty to first degree burglary and possessing a firearm and admitted a prior strike. After his plea, but before sentencing, he expressed, through his attorney, a desire to withdraw his plea and appoint new counsel. The trial court appointed substitute counsel solely to consider a motion to withdraw the plea. When substitute counsel reported that he saw no basis to withdraw the plea, the trial court allowed the original counsel to continue to represent defendant. Defendant was then sentenced.

On appeal, defendant contends the trial court violated his right to counsel by failing to hold a *Marsden*¹ hearing and instead appointing substitute counsel solely to evaluate the motion. He further contends the trial court erred by failing to personally determine whether a motion to withdraw the plea existed. As to the first contention, the People concede error. We agree and will therefore remand. We, however, disagree as to the second contention.

BACKGROUND

Defendant and an accomplice entered a home and took property from it. In exchange for dismissing various charges and the possibility of completing a rehabilitation program in lieu of prison, defendant pleaded guilty to residential burglary (Pen. Code, § 459; count 2) and possessing a firearm as a felon (Pen. Code, § 29800, subd. (a)(1); count 4). He also admitted a prior serious felony.

At sentencing, defense counsel reported that defendant, “might have some desire to withdraw his plea.” The trial court allowed defense counsel a week to determine if there was a basis to withdraw the plea. A week later, the following colloquy occurred:

“[DEFENSE COUNSEL]: [¶] . . . [¶] [Defendant] has expressed some interest in withdrawing his plea. I have had an opportunity to review the plea, change of plea transcript. My opinion is there’s no basis. In view of that, [defendant] indicates to me he’d like to explore the possibility of incompetence of counsel and appointment of a new attorney this morning.

“THE COURT: This is — so I can appoint a lawyer to look into the plea on that basis?

“[DEFENSE COUNSEL]: Exactly.

THE COURT: Could I have a stipulation that I can do [it] without doing the *Sanchez* hearing?

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

“[THE PROSECUTION]: Yes, Your Honor.

“[DEFENSE COUNSEL]: Yes.

“THE COURT: [Substitute Counsel] are you available?

“[SUBSTITUTE COUNSEL]: Yes.

“THE COURT: I’ll appoint you on the issue of the motion to withdraw [the] plea only.”

The court then put the matter over for two weeks.

Two weeks later, substitute counsel reported: “I have reviewed the plea transcript and discovery. I’ve interviewed some witnesses. I don’t think — I don’t see any grounds for withdraw of plea. I know [the original defense counsel] was the attorney who pled [defendant].” The court then directed the original counsel to continue to represent defendant. Later in the hearing, the trial court said: “We’re going to put on the minute order that the motion to withdraw plea is being withdrawn.” Substitute counsel replied: “Okay.”

The court then sentenced defendant to an eight-year stipulated term: eight years for the burglary count (the middle term doubled for the strike) and 16 months (the low term doubled for the strike) for the firearm count, to run concurrently.

DISCUSSION

I

The Trial Court Erred by Failing to Hold a *Marsden* Hearing

On appeal, defendant first contends the trial court erred by failing to hold a *Marsden* hearing and instead appointing substitute counsel to evaluate a motion to withdraw the plea and reinstating original counsel after substitute counsel found no grounds. The People concede error and request that the matter be remanded to the trial court to hold a *Marsden* hearing. We agree.

This precise situation was addressed in *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*). There, after Sanchez told the court, through his counsel, that he wished to

explore having his plea withdrawn, the trial court appointed substitute counsel solely to explore a motion to withdraw. (*Id.* at p. 85.) When substitute counsel reported Sanchez “ ‘wants a trial on his case’ ” and is “ ‘adamant he wants to withdraw his plea but I don’t [find] a legal basis’ for him to do so,” the court allowed the original counsel to continue representation. (*Ibid.*) Sanchez was then sentenced. (*Id.* at p. 86.)

The Court of Appeal reversed, and the Supreme Court affirmed. It explained: “a trial court is obligated to conduct a *Marsden* hearing . . . when a criminal defendant indicates after conviction a desire to withdraw his plea on the ground that his current counsel provided ineffective assistance [but] only when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ ” (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) The court specifically disapproved of “the appointment of a substitute or ‘conflict’ attorney solely to evaluate whether a criminal defendant has a legal ground on which to move to withdraw the plea on the basis of the current counsel’s incompetence.” (*Id.* at p. 90.)

Here, a similar result obtains. Defendant, through his counsel, clearly indicated he wanted substitute counsel: “[defendant] indicates to me he’d like to explore the possibility of incompetence of counsel and appointment of a new attorney” The trial court was thus obligated to hold a *Marsden* hearing. Inviting a *Sanchez* waiver and appointing substitute counsel to assess a motion to withdraw was error.

Though the parties agree as to the error, they disagree on the proper disposition. The People ask that we follow the disposition in *Sanchez*. The *Sanchez* court approved of the appellate court’s disposition, reversing the judgment and remanding with directions to hear a *Marsden* motion. (*Sanchez, supra*, 53 Cal.4th at pp. 92-93.) But the trial court was instructed to reinstate the judgment if the *Marsden* motion is denied, if it is granted and new counsel makes no motions, or if such motions are denied. (*Sanchez*, at pp. 92-93.)

Defendant, however, effectively asks that regardless of the result of the *Marsden* hearing, new counsel should be appointed for a new sentencing hearing. He reasons that his counsel's stipulation to waive a *Marsden* hearing created a presumption that his counsel was deficient or that the attorney–client privilege had irrevocably broken. We disagree.

While defendant may make that argument at his *Marsden* hearing on remand, the record does not compel a finding that his original counsel rendered ineffective assistance. Accordingly, we will follow the disposition in *Sanchez*.

II

We Need Not Direct the Trial Court to Determine Whether There Is an Actual Basis to Withdraw the Plea

Defendant next contends the trial court erred by failing to personally determine whether a motion to withdraw the plea existed. The People did not address this contention, maintaining there is no need to address it because the first contention necessitates remand. In a letter to the court, defendant wrote, “respondent appears to concede the remand must encompass a personal determination by the trial court [as to] whether an actual basis to withdraw the plea exists” We do not read that concession into the People's brief, nor do we conclude such direction is appropriate.

Though the trial court erred in failing to hold a *Marsden* hearing and appointing substitute counsel to assess the motion to withdraw, we need not direct the trial court to determine whether there is a basis to withdraw the plea. As explained in *Sanchez*, the proper disposition is to reverse and remand with direction to hold a *Marsden* hearing.

On remand, defendant may articulate in his *Marsden* hearing why he believes he should be permitted to withdraw his plea and why his counsel was incompetent either in leading him to plea or in failing to move to withdraw the plea. Counsel may then respond. In ruling on the *Marsden* motion, the trial court necessarily considers, for the record, defendant's reasons to withdraw his plea. We, therefore, need not direct the trial

court to separately determine whether a basis to withdraw the plea exists. The *Sanchez* disposition is sufficient.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions that “ ‘(1) the court shall hold a hearing on [defendant]’s *Marsden* motion concerning his representation by [his original counsel]; (2) if the court finds that [defendant] has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or [defendant]’s *Marsden* motion is denied, the court shall reinstate the judgment.’ ” (*Sanchez, supra*, 53 Cal.4th at pp. 92-93.)

/s/
Blease, Acting P. J.

We concur:

/s/
Robie, J.

Mauro, J.